Supreme Court, U. S.
FILED
SEP 15 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-261

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL, MICHAEL FAGAN and I. WALTON BADER,

Petitioners,

vs.

TOUCHE ROSS & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION

GERALD WALPIN
Attorney for Respondent
575 Madison Avenue
New York, New York 10022
(212) 644-7000

J. KELLEY NEVLING, JR.
ROSENMAN COLIN FREUND LEWIS & COHEN
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-261

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, MARTIN F. RANDOLPH, JR., GARY MICHAEL, MICHAEL FAGAN and I. WALTON BADER,

Petitioners,

vs.

TOUCHE ROSS & COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MEMORANDUM OF RESPONDENT IN OPPOSITION

The question before the Court of Appeals (Moore, Friendly and Timbers, JJ.) was whether the District Court had abused its discretion in this class action in dismissing petitioners' complaint under Fed. R. Civ. P. 37(b) and (d) as to respondent Touche Ross & Co. ("Touche Ross")*

* The petition (*e.g.*, pp. 1, 13) is in error in stating simply that the District Court dismissed the complaint. The dismissal as to Touche Ross left unaffected plaintiffs' claims as to the other defendants. The appeal was taken on a certification pursuant to Fed. R. Civ. P. 54(b) (Pet. 29a). Touche Ross also remains liable in a consolidated action to respond to the claims of other members of the class (JA 605-10).

References designated "Pet." refer to pages of the petition for certiorari and those designated "JA" to pages of the Joint Appendix in the Court of Appeals.

and awarding it attorneys' fees on the basis of a record showing complete and deceitful failure to comply with Court orders. *National Hockey League* v. *Met. Hockey Club*, 427 U.S. 639 (1976).

The Courts below found (Pet. 4a *et seq.*, 27a *et seq.*) that there had been an inexcusable failure to respond to a few simple interrogatories for a period of about ten months, a deliberate ignoring of the directions of the District Court to respond thereto, a failure to comply with an order entered under Fed. R. Civ. P. 37(a) directing such response, and a calculated effort to mislead the Court and counsel by a "concocted story" and "false statements and . . . false testimony" as to whether there had been compliance with such order. These abuses were characterized by the Court of Appeals as "utterly intolerable and reprehensible" (Pet. 37a, ftn. 5).

The Court of Appeals found that "the pervasive findings of the district court . . . [were] more than adequately supported by the record" (Pet. 36a) and held that "the district court acted well within its discretion under the particular circumstances of this case" (Pet. 28a, 36a). A petition for a rehearing containing a suggestion that the action be reheard *en banc* was denied by the Court of Appeals, which noted that "no active judge or judge who was a member of the panel [had] requested that a vote be taken on said suggestion."*

The petition is replete with misstatements of fact. Although the petition asserts that the purported facts it sets

* A copy of the order of the Court of Appeals is annexed hereto as Appendix A.

forth are "uncontroverted" or "undisputed" (*e.g.* Pet. 10), many of them are not only "controverted" but are contrary to fact, as the opinions of the District Court (Pet. 4a *et seq.*) and Court of Appeals (Pet. 27a *et seq.*) show. The boldness with which statements are made which are directly contradicted by the record is a continuation of what the Court of Appeals called "the genius for confusion which [petitioners'] counsel has demonstrated throughout" (Pet. 30a, ftn. 3).

The disingenuousness of the petition is demonstrated by the facts that in the District Court petitioners' attorney claimed that certain alleged copies of purported "answers" to interrogatories had been "inadvertently" mailed and that he had had nothing to do with the mailing (Pet. 4a *et seq.*); that the Court found that petitioners' counsel had himself deliberately mailed them to create the belief that there had been compliance with the Court order, when there had not been, and had then presented a "concocted story" through false statements and testimony to conceal the fact (*id.*); and now, in this Court, the petition (pp. 28-29) suggests that petitioners' counsel deliberately mailed the alleged copies* but had no alternative because otherwise it would have been apparent that petitioners were in noncompliance with the Court order. So manifold are the deceptive misstatements in the petition that it would take a brief of inordinate length to set the record straight. We do not deem such imposition on this Court to be necessary.

* The statements in the petition (pp. 3, 5, 17, 28) that it is "conceded" and "undisputed" that those alleged copies "were entirely correct" and "gave the adverse party all of the information that it required", are incorrect. Not only was such not conceded, but it is contrary to fact (JA 477-86, 550, 544, 573-76).

Indeed, the petition is so inaccurate, confused and prolix, and the points it makes and the authorities it cites so irrelevant and misconstrued, as to warrant its denial pursuant to Rule 23(4) of this Court.

The decision of the Court of Appeals does not present any novel or important question of legal principle warranting review by this Court. It involves no substantial question of construction of federal or state law. It involves merely the application of settled principle to the facts of this case. None of the considerations governing review on certiorari set forth in Rule 19 of this Court is present here.

The opinions below (Pet. 4a *et seq.*, 27a *et seq.*) show willfulness, bad faith and fault. There was here no "inability" to comply due to circumstances beyond petitioners' control [see *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211 (1958)]; rather, there was not only a willful violation of a Court order under deceitful circumstances, but a record showing a complete and calculated indifference from the start to petitioners' responsibilities as litigants under the Rules of the Court (Pet. 27a *et seq.*, 4a *et seq.*). Consideration of the "full record" (*National Hockey League* v. *Met. Hockey Club, supra,* at 641-42) abundantly supports the conclusion of the Court of Appeals.

As to the various points urged by petitioners, the Court of Appeals stated that it had "carefully considered appellants' other claims and we find them to be without merit" (Pet. 37a); and we believe that is clearly apparent.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GERALD WALPIN
Attorney for Respondent

J. KELLEY NEVLING, JR.
ROSENMAN COLIN FREUND LEWIS & COHEN
Of Counsel

Appendix A

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-eight.

77-7187

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, in behalf of its membership affected & in behalf of the classes involved herein, *et. al.*

Plaintiffs

INDEPENDENT INVESTOR PROTECTIVE LEAGUE, *et. al.*
Plaintiffs-Appellants

v.

TELEPROMPTER CORPORATION, TOUCHE, ROSS & COMPANY, HERBERT SCHLAFLY, *et. al.*

Defendants

TOUCHE, ROSS & COMPANY,
Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellants, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN

IRVING R. KAUFMAN, Chief Judge

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(7442)